Nazarrimi bin Sahib v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–54 OF 2004
RAUS SHARIF, ABDULL HAMID EMBONG AND ABU SAMAH JJCA
7 NOVEMBER 2008

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Innocent carrier — Whether serious misdirections committed by trial judge rendered conviction unsafe — Whether trial judge had drawn inference of guilt based on accused's failure to give notice of his defence at prosecution stage — Whether trial judge accepted similar fact evidence without conducting a balancing exercise to determine its probative value — Whether trial judge had not subjected evidence of prosecution witness to more rigorous test of credibility

In the course of investigating one Md Nasir bin Sajad ('Nasir'), who was arrested for a drug offence the police discovered that on three previous occasions Nasir had purchased cannabis from Nazarrimi bin Sahib, the accused. Thereafter the police set out a plan to trap and arrest the accused. According to the plan Nasir was asked to make a telephone call to the accused to order half a kg of cannabis from the accused. The order was placed and the accused agreed to supply the same to Nasir at a place called Parit Tegak. An ambush party laid in wait at the said meeting place with Nasir handcuffed to the seat holder of the motorcycle and a police detective hiding behind that motorcycle. When the accused riding a motorcycle neared Nasir, the police detective seized him by the neck and in the course of that struggle the ambush party dashed out of their hiding place to help. A body search on the accused revealed that the accused was carrying 13.2g of cannabis in his trouser pocket and another 459g in the carrier of his motorcycle. The cannabis in the trouser pocket and the carrier, which altogether totaled 472.02g of cannabis, formed the subject matter of the first charge of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') against the accused. The second charge related to 989g of cannabis found in a disused refrigerator outside a house in Muar but the accused was acquitted dan discharged of this charge. In respect of the first charge, the defence of the accused was that he was an innocent carrier. In his defence the accused testified that the package in the carrier of the motorcycle belonged to his friend who had asked him to deliver it to Nasir at Parit Tegak and that he had done so with no knowledge of the contents of the package. With regard to the small packet of cannabis

found in his trousers pocket the accused denied it was his. The accused was however convicted and sentenced to death in respect of the first charge and this was his appeal against that conviction. In his appeal the accused submitted that there were misdirections committed by the trial judge which rendered his conviction unsafe. The misdirections relied upon by the accused were that the trial judge had drawn an inference of guilt based on his failure to give notice of his defence at the prosecution's stage; that the trial judge had accepted similar fact evidence without conducting a balancing exercise to determine its probative value; and that Nasir's evidence had not been subjected to a more rigorous test of credibility by the trial judge.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) When the prosecution closed its case, the trial judge had made an express affirmative finding of possession without relying on the legal presumption under the Act because he was satisfied based on the direct evidence that the accused had custody or control and knowledge of the cannabis found in the carrier of the motorcycle and in his trousers pocket. Therefore the later comment by the trial judge that 'the defence even revealed the guilty knowledge of the accused' must be read in its proper context. Basically the trial judge was giving reasons as to why he did not believe the accused's defence and testing this against what he had earlier concluded at the close of the prosecution's case on the issue of possession. Thus the trial judge did not draw an inference of guilt on the failure of the accused to give notice of his defence at the prosecution's stage. On the contrary the accused was found guilty because he was unable to give a plausible explanation as to how he was in possession of the drugs (see paras 18, 20 & 21).

(2) The trial judge had fully understood and applied the underlying rationale of admitting similar fact evidence. Therefore, when the trial judge relied on Nasir's evidence that he had on three previous occasions purchased cannabis from the accused, he was trying to show that possession of the drug by the accused in this case was not accidental. Thus this similar fact evidence was not the basis of the trial judge's finding that the accused was trafficking in the said drugs. The basis was that the accused was in actual possession of the cannabis (see paras 24 & 28).

(3) The fact that the trial judge did caution himself on the propriety of relying on Nasir's evidence was clear from his assessment of the evidence. From the reasons given by the trial judge it was also clear that he had subjected Nasir's evidence to a rigorous test of credibility and found him to be a credible and truthful witness. Moreover it was most unusual for an appellate tribunal to reverse a trial judge's finding on

credibility as the true or false note of Nasir's evidence was more audible to the trial judge than to an appellate court (see paras 31-33).

[Bahasa Malaysia summary

Dalam proses penyiasatan terhadap seorang yang bernama Md Nasir bin Sajad (Nasir), yang telah ditahan bagi satu kesalahan dadah polis mendapati bahawa pada tiga kali sebelumnya Nasir telah membeli kanabis daripada Nazarrimi bin Sahib, tertuduh. Kemudiannya polis menyusun satu rancangan untuk memerangkap dan menahan tertuduh. Menurut rancangan tersebut Nasir diminta untuk membuat satu panggilan telefon kepada tertuduh untuk memesan setengah kilogram kanabis daripada tertuduh. Pesanan tersebut dibuat dan tertuduh bersetuju untuk membekalkannya kepada Nasir di satu tempat bernama Parit Tegak. Satu pihak penyerang hendap siap menunggu di tempat perjumpaan tersebut dengan Nasir digari pada pemegang tempat duduk motosikal dan seorang detektif polis bersembunyi di belakang motosikal tersebut. Apabila tertuduh yang menunggang motosikal menghampiri Nasir, detektif polis tersebut menangkapnya di bahagian leher dan dalam proses pergelutan itu pihak penyerang hendap meluru keluar daripada tempat persembunyian mereka untuk membantu. Pemeriksaan pada seluruh badan tertuduh mendedahkan bahawa tertuduh membawa 13.2g kanabis di dalam poket seluarnya dan 459g lagi di dalam tempat membawa barang motosikalnya. Kanabis di dalam poket seluarnya dan tempat membawa barang tersebut, yang mana semuanya berjumlah 472.02g kanabis, membentuk subjek teras pertuduhan pertama pengedaran dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') terhadap tertuduh. Pertuduhan kedua berkaitan dengan 989g kanabis yang dijumpai di dalam peti sejuk yang tidak digunakan di luar sebuah rumah di Muar tetapi tertuduh telah dibebaskan dan dilepaskan daripada pertuduhan ini. Berkenaan pertuduhan pertama, pembelaan tertuduh adalah bahawa dia seorang pembawa yang tidak bersalah. Dalam pembelaannya tertuduh memberi keterangan bahawa bungkusan di dalam tempat membawa barang motosikal tersebut adalah milik kawannya yang memintanya menghantar barang tersebut kepada Nasir di Parit Tegak dan bahawa dia telah melakukannya tanpa pengetahuan mengenai kandungan bungkusan tersebut. Berkenaan dengan bungkusan kecil kanabis yang dijumpai di dalam poket seluarnya tertuduh menafikan ia adalah miliknya. Tertuduh walau bagaimanapun telah disabit dan dihukum mati berkenaan pertuduhan pertama dan ini adalah rayuannya terhadap sabitan tersebut. Di dalam rayuannya tertuduh mengemukakan bahawa terdapat salah arah yang dilakukan oleh hakim perbicaraan yang menyebabkan sabitannya tidak selamat. Salah arah-salah arah yang disandarkan oleh tertuduh adalah bahawa hakim perbicaraan telah membuat inferens bersalah berdasarkan kegagalannya untuk memberi notis

pembelaannya semasa peringkat pendakwaan, bahawa hakim perbicaraan telah menerima fakta keterangan yang sama tanpa melakukan keseimbangan untuk menentukan nilai kemungkinannya, dan bahawa keterangan Nasir tidak dikenakan ujian kredibiliti yang lebih rapi oleh hakim perbicaraan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Apabila pendakwaan menutup kesnya, hakim perbicaraan telah membuat satu penemuan afirmatif yang jelas berkenaan pemilikan tanpa bergantung kepada andaian undang-undang di bawah Akta tersebut kerana dia telah berpuashati berdasarkan kepada keterangan langsung bahawa tertuduh mempunyai jagaan dan kawalan dan pengetahuan tentang kanabis yang dijumpai di dalam tempat membawa barang motosikal tersebut dan poket seluarnya. Oleh itu komen seterusnya oleh hakim perbicaraan bahawa 'pembelaan malah mendedahkan pengetahuan bersalah tertuduh' mesti dibaca di dalam konteksnya yang betul. Secara asasnya hakim perbicaraan memberi alasan-alasan kenapa beliau tidak mempercayai pembelaan tertuduh dan mengujinya terhadap apa yang telah diputuskan terdahulu di penutupan kes pendakwaan mengenai isu pemilikan. Oleh itu hakim perbicaraan tidak membuat satu inferens bersalah ke atas kegagalan tertuduh memberi notis pembelaannya di peringkat pendakwaan. Sebaliknya tertuduh didapati bersalah kerana dia tidak dapat memberi penjelasan yang munasabah berkenaan bagaimana dia mempunyai milikan dadah tersebut (lihat perenggan 18, 20 & 21).

(2) Hakim perbicaraan memahami secara menyeluruh dan mengaplikasi rasional yang menjadi dasar berkaitan dalam menerima fakta keterangan yang sama. Oleh itu, apabila hakim perbicaraan bergantung kepada keterangan Nasir bahawa dia telah pada tiga kali sebelumnya membeli kanabis daripada tertuduh, beliau mencuba untuk menunjukkan pemilikan dadah tersebut oleh tertuduh dalam kes ini bukanlah satu kebetulan. Maka fakta keterangan yang sama ini bukanlah asas penemuan hakim perbicaraan bahawa tertuduh adalah mengedar dadah tersebut. Asasnya adalah tertuduh mempunyai milikan sebenar kanabis tersebut (lihat perenggan 24 & 28).

(3) Fakta bahawa hakim perbicaraan telah memberi amaran kepada dirinya sendiri atas kesesuaian untuk bergantung kepada keterangan Nasir adalah jelas daripada penilaian keterangannya. Dari alasan-alasan yang diberikan oleh hakim perbicaraan ia adalah juga jelas yang beliau telah mengenakan ujian kebolehpercayaan yang ketat ke atas keterangan Nasir dan mendapati dia adalah saksi yang boleh dipercayai dan jujur. Tambahan lagi ia adalah sangat janggal bagi satu tribunal rayuan untuk mengakas penemuan hakim perbicaraan di atas kebolehpercayaan

kerana betul atau salah keterangan Nasir lebih sesuai didengar oleh hakim perbicaraan daripada mahkamah rayuan (lihat perenggan 31–33).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)
Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334; [2004] 6 AMR 810, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Boardman v DPP [1974] 3 All ER 887, HL (folld)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (folld)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Ryan v Jarvis [2005] UKPC 27, PC (refd)
Wong Yew Ming v PP [1991] 1 MLJ 31, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)(a)

Hisyam Teh Poh Teik (Teh Poh Teik and Co) for the appellant.
Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] The accused was charged with two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') in the High Court, Muar. The first charge relates to 472.2g of cannabis found in the carrier of motorcycle No JFG 8176 ridden by the accused and also in his left trousers pocket. The offence took place on 5 April 2000 at about 9.30pm at Simpang Parit Tegak, Jalan Muar, Parit Sulong, Batu Pahat, Johor.

[2] The second charge relates to 989g of cannabis found in a disused refrigerator outside an unnumbered house at Batu 18, Air Hitam, Muar, Johor.

[3] The accused was acquitted and discharged of the second charge. However, he was convicted and sentenced to death in respect of the first charge. Hence, this appeal.

[4] We heard this appeal on 16 September 2008 and unanimously dismissed it. A

[5] Briefly, the case for the prosecution is as follows. On 5 April 2000, at about 7.30pm, Md Nasir bin Sajad (SP6) was arrested by Chief Inspector Ramesh a/l Nagayan (SP9) for a drug offence. 48g of cannabis were found in and around SP6's house. SP6 was interrogated. During the interrogation, SP6 informed SP9 that he had purchased the cannabis from the accused. He also told SP9 that he had on three previous occasions purchased cannabis from the accused. B C

[6] On the same day the police worked out a plan to trap and arrest the accused. SP6 was asked to make a telephone call to the accused to purchase cannabis. After several attempts, SP6 was able to contact the accused. SP6 ordered ½ kg of cannabis from the accused which the accused agreed to supply. SP6 was asked by the accused to wait for him at a place called Parit Tegak. D

[7] A police team led by SP9 left for Parit Tegak at about 9.20pm. They took up ambush position. Meanwhile, SP6 went to Parit Tegak on a motorcycle with Detective Corporal Azman bin Mujid (SP11). At Parit Tegak, both SP6 and SP11 waited at a road junction. SP6 was handcuffed to the seat holder of the motorcycle while SP11 hid behind that motorcycle. E

[8] At about 9.30pm the accused appeared riding a motorcycle. As he was approaching SP6, SP11 sprung out from his hiding place and seized the accused by the neck. There was a struggle. At that instant SP9 and his men dashed out from their hiding place to help SP11. F

[9] SP9 did a body search on the accused. A small plastic containing dried plant material suspected to be cannabis from left trousers pocket of the accused was recovered. It was later confirmed to be 13.02g of cannabis. SP9 then searched the motorcycle. In the carrier of the motorcycle, SP9 found a compressed block of dried plant material which was wrapped in a transparent plastic and tied with a red raffia string. The compressed block was subsequently confirmed to be 459g of cannabis. The cannabis in the trousers pocket and the carrier formed the subject matter of the charge, 472.02g of cannabis. G H

[10] At the end of the prosecution's case the learned trial judge called upon the accused to enter into his defence. The accused elected to give evidence on oath. He was the only witness for the defence. I

[11] In essence, the defence of the accused was that he was an innocent carrier. He said that on the day in question at about 8.10pm he was dining at a foodstall with Afandi, Alim and a few others. Afandi then received a telephone call. He did not know who the caller was. After the call, Afandi borrowed his motorcycle to go home. Then Afandi returned. Afandi then requested the accused to send the package in the carrier of the motorcycle to SP6 at Parit Tegak. The accused did. The accused said he had no knowledge of the contents of the package. With regard to the small packet of cannabis found in his trousers pocket the accused denied it was his.

[12] At the conclusion of the trial the accused was found guilty and sentenced to death. Before us, En Hisyam Teh Poh Teik, learned counsel for the accused, submitted that there are misdirections committed by the learned trial judge which render the conviction of the accused unsafe. These misdirections relate to the following aspects:

(i) the finding that the accused was guilty based on non-disclosure of his defence during the case for the prosecution;

(ii) failure or omission to conduct a balancing exercise before relying on similar fact evidence; and

(iii) failure or omission to subject the evidence of SP6 to a more rigorous test of credibility.

NON-DISCLOSURE OF DEFENCE

[13] The complaint by En Hisyam is over what was said by the learned trial judge in the grounds of judgment which reads as follows:

> One aspect of the defence even revealed the guilty knowledge of the accused. That there was no notice of the defence case with respect to the events before and during the arrest is only half the story. There was also no notice of the defence case that the accused professed his innocence to the police or that the drugs in the jeans pocket were planted by someone from the ambush party. As a matter of fact, the defence did not challenge the prosecution's version of the sequence of events at the road junction, with respect to the discovery of the drugs in the carrier and the drugs in the jeans pocket, and with respect to the happenings after the arrest.

[14] Encik Hisyam submitted that the above is a serious misdirection. He candidly put forth his argument as follows. 'A defence can be criticised as an afterthought or a recent invention in the event no notice was given. This is all the law allows. But to go further to hold that the accused would be guilty if no notice is definitely erroneous'. In support, he referred to what was said by Edgar Joseph Jr FCJ in *Alcontara a/l Ambross Anthony v Public Prosecutor*

[1996] 1 MLJ 209. For ease of reference we reproduced what was said by Edgar Joseph Jr FCJ in that case. He said it in two parts. At p 216 of the judgment, he stated as follows:

> But before we move on to consider other aspects of this appeal we think it would not be out of place if we said something by way of guidance to the courts below when criticising an accused person for having made a belated disclosure of his defence. It goes without saying that our remarks which follow apply only to those cases where there has, in fact, been a belated disclosure of the defence.
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> It is clear that a judge must tread warily when commenting on that fact that an accused has chosen to conceal the lines of his defence until the trial, rather than disclosing them at or about the time of his arrest during police interrogation. He may observe that such a stance would make it difficult for the police to check the veracity of the accused's version of facts, and so, detracts from the weight to be accorded it. (See *R v Littleboy* [1934] 2 KB 408; *R v Ryan* (1966) 50 Cr App R 144). That, however, is as far as he can go, for should he go further and infer that such non-disclosure provide a basis for assuming that the accused is guilty (see *R v Sullivan* (1967) 51 Cr App R 102; *R v Hoare* [1966] 2 All ER 846), he would be misdirecting himself in law.

[15] The second part is found at p 218 which reads:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and this avoid the adverse comment, that the defence is a recent invention, in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.
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> At this stage, we would interpolate to remark — though we are digressing somewhat from the point concerning the onus of proof — that the judge went so far as to hold 'that the defence by its failure so to put such questions to the prosecution witness ought not to be allowed to raise such issues at the defence stage'. In this, he was clearly wrong, since it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

[16] Premised upon the above, En Hisyam submitted that it was wrong for the learned trial judge, in the present case, to draw an inference of guilt on the failure of the defence to give notice of its defence at the prosecution's

stage. By doing so, he submitted that the accused had been prejudiced and his case had been seriously weakened and thus substantially disadvantaged. On this score alone, En Hisyam urged this court to set aside the conviction.

[17] With utmost respect we disagree. We have no difficulty in accepting the principles stated by Edgar Joseph Jr FCJ. But the present case is not a case where the learned trial judge had penalised the accused to the extent that the accused was guilty of mens rea possession (knowledge of the drug) on the sole ground that no notice was given by the accused of his defence at the prosecution's stage. It is also not a case where the learned trial judge went on to hold that the defence by its failure to put such questions to the prosecution witnesses ought not be allowed to raise such issues at the defence's stage.

[18] What happened in the present case is this. At the close of the prosecution's case the learned trial judge made an express affirmative finding of possession without relying on the legal presumption under the Act. He was satisfied based on direct evidence that the accused had under his control or in his custody of the package found in the carrier of the motorcycle and the small plastic packet found in the accused's trousers pocket. He was also satisfied that the accused knew that there were cannabis in both the package as well as the plastic packet.

[19] In his defence the accused testified that the package in the carrier of the motorcycle belonged to his friend, Afandi who had asked him to deliver it to SP6. With regard to the small packet found in his trousers pocket the accused denied it was his.

[20] It was the belated disclosure of the defence that prompted the learned trial judge to comment that 'the defence even revealed the guilty knowledge of the accused'. His reason was the defence had failed to give notice of its defence at the prosecution's case. We are of the view that the comment by the learned trial judge must be read its proper context. It was made when he was dealing with the accused's explanation at the defence stage. Basically the learned trial judge was giving his reasons as to why he did not believe the accused's defence. The trial judge was in fact testing the accused explanation against what he had earlier concluded at the close of the prosecution's case on the issue of possession.

[21] After reading the judgment as a whole, we are very clear that the accused was not found guilty of mens rea possession (knowledge of the drugs) on the ground that no notice was given of his defence at the prosecution's stage. The learned trial judge was also not drawing an inference of guilt on the failure of the defence to give notice of its defence at the prosecution's stage. On the contrary the accused was found guilty because he was unable

to give a plausible explanation as to how he was in possession of the said drugs.

SIMILAR FACT EVIDENCE. FAILURE TO CONDUCT A BALANCING EXERCISE

[22] The complaint by En Hisyam is in relation to the evidence of SP6. SP6 testified, inter alia, that he had on three previous occasions purchased cannabis from the accused. This evidence was accepted by trial judge. At p 59 of the appeal record the learned trial judge said:

> And indeed, there was direct evidence that it was more than passive possession. SP6 testified that he had purchased cannabis from the accused on three previous occasions.

[23] It is the contention of En Hisyam that the above is 'similar fact evidence'. According to him, before the learned trial judge accepted similar fact evidence he ought to carry out a balancing exercise to determine whether the probative value of such evidence outweighs its prejudicial effects or vice versa. This, according to him, was not done and it amounted to a non-direction giving rise to a misdirection. In support of the above argument, En Hisyam referred to *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810 where Gopal Sri Ram JCA speaking on behalf of this court said (at pp 345–346 of MLJ and p 821 of AMR):

> A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss 14 and 15 of the Evidence Act. The court would be justified in admitting the evidence where its probative value is outweighed by its prejudicial effect. See, *Boardman v Director of Public Prosecutions* [1975] AC 421; *Director of Public Prosecutions v Public Prosecutor* [1991] 2 AC 447; *Junaidi bin Abdullah v Public Prosecutor* [1993] 2 AMR 2209; [1993] 3 MLJ 217; *Public Prosecutor v Teo Ai Nee* [1995] 2 SLR 69; *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR 422; *Lee Kwang Peng v Public Prosecutor* [1997] 3 SLR 278.
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> In *Tan Meng Jee v Public Prosecutor*, Yong Pung How CJ when delivering the judgment of the Singapore Court of Appeal said of the equipollent provisions in the Singapore Evidence Act:
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> > Be that as it may, we are of the opinion that the admission of similar fact evidence, at least for the purposes identified in ss 14 and 15 of the Evidence Act, should be governed by the balancing test adopted by the House of Lords in *Boardman*'s case. Such an approach is warranted both in principle as well as on the wording of the legislation itself. As to the former, it has been argued above that the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to

> have committed the acts within the charge. It would be subverting established jurisprudence to allow a conviction based on the particular disposition of the accused — based on the contention that the accused is that type of person who would commit such an offence. On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence.

With respect we entirely agree with the aforesaid dictum coming as it does from so authoritative a source as His Honour the Chief Justice of Singapore. Further, like His Honour, we also find illustration (o) to s 14 of the Evidence Act 1950 to be relevant. That illustration reads:

> (o) *A* is tried for the murder of *B* by intentionally shooting him dead. The fact that *A* on the other occasions shot at *B* is relevant as showing his intention to shoot *B*. The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant.

So, here too, PW2's evidence as to the appellant's previous acts of intercourse with her was relevant, that is to say, admissible. But that does not, on the authorities we have cited, relieve the court of determining whether the probative value of the evidence outweighed its prejudicial effect. We have carefully examined the record and nowhere in the judgment of the sessions court is there the kind of balancing exercising dictated by ss 14 and 15 of the Evidence Act. This is a serious misdirection. It occasioned a serious miscarriage of justice as the sessions court acted on the similar fact evidence to add three further charges against the appellant.

In the context of the similar fact evidence in this case we find it useful to recall the words of Scarman LJ in *R v Scarrott* [1978] QB 1016:

> Positive probative value is what the law requires, if similar fact evidence is to be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some features in the evidence sought to be adduced which provides a link, an underlying as it has been called in some of the cases. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so common place that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration.

[24] On perusing the learned trial judge's judgment, we find this submission of learned counsel to be without merit. In considering whether to admit SP6's evidence or not we found that the learned trial judge had fully understood, and applied the underlying rationale of admitting similar fact evidence. He had considered the principles as laid down in high authorities such as *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217, and *Boardman v Deputy Public Prosecutor* [1974] 3 All ER 887 in coming to his decision.

[25] From the latter case, the learned trial judge had adverted to the speech by Lord Morris who made this observation on the need to do a balancing exercise before admitting such evidence, by quoting this paragraph:

> On the principle laid down in *Makin*'s case and *Boardman*'s case, we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise be open to the accused (in addition to those under ss 14 and 15 of the Evidence Act 1950), it is admissible in evidence provided *the probative value of such evidence outweighs its prejudicial value*. There must be a real anticipated defence to be rebutted and not merely 'crediting the accused with a fancy defence' as emphasised by the Privy Council in *Noor Mohamed v R* at p 192.
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> (Emphasis added.)

The case of *Azahan bin Mohd Aminallah* cited by En Hisyam in his submission also makes reference to *Boardman*, in concluding on the need to undertake this balancing exercise.

[26] We are satisfied that the learned trial judge had on his mind the need to do this balancing exercise.

[27] Evidence of a witness that an accused person had sold dangerous drugs to him is admissible. In *Wong Yew Ming v Public Prosecutor* [1991] 1 MLJ 31, the following question of law was posed to the then Supreme Court (at 9 32):

> Whether in a trial which the accused is charged for trafficking in respect of a particular quantity of dangerous drugs, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasion he had sold dangerous drugs, although such evidence is prejudicial to the accused.

The Supreme Court held that (at p 33):

> In this case the evidence of PW8 is admissible not because it tends to show that a person committing one offence is likely to commit another but to show knowledge or intention of the applicant and that the possession is not accidental.

[28] In the present case, when the learned trial judge relied on the evidence of SP6 that he had on three previous occasions purchased cannabis from the accused, he was trying to show that possession of the drug by the accused in this case was not accidental. But it was not the basis of the trial judge's finding that the accused was trafficking the said drugs. The basis was that the accused was in actual possession of the said drugs. As demonstrated by the learned trial judge in his ground of judgment, there are overwhelming evidence against the accused. Thus, reliance by the learned trial judge on the evidence of SP6 that he had on three previous occasions sold drugs to the accused had not resulted in a serious miscarriage of justice that warranted the conviction to be set aside.

[29] An extract from the learned trial judge's judgment shows that his conclusion was based on incontrovertible facts as he had found them, and we quote this passage:

> In the instant case, in relation to both physical and mental elements, it was established beyond all doubt that a block of drugs tied with raffia string and wrapped in translucent plastic was in the carrier of JFG 8176. It was also established beyond all doubt that the accused was the rider of that motorcycle, which could only mean that the accused was in charge and in control of that motorcycle. Given that it was in the carrier in front of him, just below his eye, that block of drugs was clearly visible to the accused. Given that it was wrapped in translucent plastic, the contents of that block of drugs in the carrier were clearly visible to the accused. Being almost literally between his thighs, that block of drugs was just inches in front of the accused. At the material time, the block of drugs in the carrier that was clearly visible to the accused was being moved around in the carrier of a motorcycle in the charge and in the control of the accused. Given those facts, there could only be the one inference that the accused was in possession of the block of drugs in the carrier. And given those same facts, there could only be the one inference that the accused knew he was then in possession of the block of drugs in the carrier of the motorcycle ridden by him, and that the accused was aware of the nature of the contents. The prosecution had quite clearly made out that the accused was in possession of the block of drugs in the carrier.

FAILURE TO SUBJECT SP6'S EVIDENCE TO A MORE RIGOROUS TEST OF CREDIBILITY

[30] The complaint by En Hisyam is that the learned trial judge did not subject SP6's evidence to a more rigorous test of credibility as required by both *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85. In particular it is submitted that there was no maximum evaluation of SP6's evidence with regard to the aspect of the alleged telephone conversation with the accused.

[31] Again, we are unable to agree. The learned trial judge did caution himself on the propriety of relying on SP6's evidence. This is what he said:

> It was only right that SP6's testimony should be received with utmost circumspection. But SP6's testimony could not not be believed or not trusted. In the first place, SP6 was corroborated on all aspects that could be corroborated. On the matter of SP9's request to SP6 to telephone Nazarrimi and order a ½ kilogram of cannabis from Nazarrimi, SP9 testified that he indeed made that 'request' to SP6. On the matter of the telephone call to Nazarrimi, SP9 and SP11 testified that a telephone call was indeed made at the said public telephone to one Nazarrimi. On the matter of the actual telephone conversation itself, SP9 testified that he indeed overheard SP6 mentioning '½ kilogram' and 'Simpang Tiga'. On the matter of the outcome of that order, SP9 testified that SP6 indeed informed him that

Nazarrimi had agreed to deliver a ½ kilogram of cannabis at the said road junction. In relation to the words said by the person at the other end, it was heard only by SP6. What SP6 said had been said by Nazarrimi at the other end could not be corroborated by SP9 or SP11. But yet on the matter of the words said by the person at the other end, SP6 was entirely vindicated by the events after the telephone call to Nazarrimi.

[32] Further, on assessing the evidence of SP6 the learned trial judge said:

On the matter of actual telephone conversation itself, SP9 testified that he indeed overheard SP6 mentioning '½ kilogram' and 'Simpang Tiga'. On the matter of the outcome of that order, SP9 testified that SP6 indeed informed him that Nazarrimi had agreed to deliver a ½ kilogram of cannabis at the said road junction. In relation to the words said by the person at the other end, it was heard only by SP6. What SP6 said had been said by Nazarrimi at the other end could not be corroborated by SP9 or SP11. But yet on the matter of the words said by the person at the other end, SP6 was entirely vindicated by the events after the telephone call to Nazarrimi. SP6 testified that he informed SP9 that Nazarrimi would ride a Honda EX5 motorcycle to deliver a ½ kilogram of cannabis at the said road junction. SP9 testified that with such information the ambush party rushed to the road junction. SP11 testified that SP6 informed him that the motorcyclist approaching the said road junction was the said Nazarrimi. That motorcyclist turned out indeed to bear the name Nazarrimi and to ride a Honda EX5 motorcycle. That motorcyclist turned out indeed to be in possession of about a ½ kilogram of cannabis. And that motorcyclist turned out indeed to be at the said road junction, just as had been said by SP6. There could be no question about it. It was indeed said to SP6 that a ½ kilogram of cannabis would be delivered at the said road junction. SP6 could not have been so true with his information if there were no truth that SP6 had been told that a ½ kilogram of cannabis would be delivered at the said road junction. And SP6 could not have been so true with his description of the person who would deliver that ½ kilogram of cannabis and or of the motorcycle that the person would ride on, if SP6 had not dealt with that person before. Nope, it was proved that SP6 was a credible and truthful witness. And it was shown that SP6's testimony could be received with absolute confidence.

[33] From the above, it is clear that the learned trial judge did subject SP6's evidence to a rigorous test of credibility. Nevertheless he found SP6 was a credible and truthful witness. He gave his reasons. The question is, what is the role of an appellate tribunal in this situation. There is no dearth of authorities to say that it is most unusual for an appellate tribunal to reverse a trial judge's finding on credibility. The reason is obvious. 'The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record' (see *Ryan v Jarvis* [2005] UKPC 27, and *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644). In the present case the true or false note of SP6's evidence was certainly more audible to the trial judge than to us. We have no reason to reverse his finding.

A [34] In conclusion, having very carefully scrutinised the evidence on record and carefully examined the judgment under appeal we are satisfied beyond reasonable doubt that the conviction of the accused is safe. The appeal is accordingly dismissed. The conviction entered against and the sentence passed upon the accused are affirmed.

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Appeal dismissed. Conviction and sentence affirmed.

Reported by K Nesan

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